

NO. 48833-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEDRIC GREER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The court's imposition of a facially invalid sentence demonstrates that Mr. Greer received ineffective assistance of counsel during the sentencing proceeding.

a. The prosecution's concession of the sentencing error demonstrates defense counsel's deficient performance when stipulating to a legally erroneous criminal history.

The prosecution agrees that the judgment and sentence and sentencing stipulation include a facially invalid comparability determination for an Alabama conviction. Response Brief at 6. Both documents say a 2005 Arkansas conviction for felony theft is comparable to RCW 46.12.750. CP 17, 32. But an out-of-state conviction may only be counted in a person's offender score if it is comparable to a Washington offense that existed at the time of the prior offense. *See State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); *In re Pers. Restraint of Crawford*, 150 Wn.App. 787, 794-95, 209 P.3d 507 (2009).

RCW 46.12.750 did not exist in 2005. Therefore, it cannot be the basis of a valid comparability determination.

The prosecution asks this Court to disregard the error and treat it as a mere clerical mistake. It cannot be dismissed as a mistake because

it involves a substantive comparability determination based on an inapplicable statutory comparison. The current RCW 46.12.750 was not simply renumbered from its former version in RCW 46.12.210(2005). The statute was changed and the current version is broader than it was in 2005. *See* Opening Brief at 19 and Appendix A (copy of statutes).

The record indicates that no one compared, or found, the Arkansas statute to the pertinent 2005 Washington statute, which is required to include an out-of-state conviction in a person's offender score. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)

Neither the stipulation nor the judgment and sentence reflect any comparability determination based on the accurate statute in effect at the time of the prior offense. This facial invalidity undermines the comparability determination and results in an illegal sentence.

The defense attorney's invalid stipulation constitutes deficient performance. *Crawford*, 150 Wn.App. at 793 (attorney's failure to challenge Kansas conviction constitutes ineffective assistance). Deficient sentencing performance constitutes ineffective assistance of counsel if there is a reasonable probability of prejudice. *See State v. Saunders*, 120 Wn.App. 800, 825, 86 P.3d 232 (2004) (counsel

ineffective to failing to advocate for decreased offender score based on potentially prevailing same criminal conduct argument).

Contrary to the prosecution's depiction of the standard of review, Mr. Greer is not required to definitively prove the prior offense could not count in his offender score. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) ("appellant need not prove that the outcome would have been different but must show only a 'reasonable probability' –by less than a more likely than not standard--that, but for counsel's unprofessional errors, the result of the proceedings would have been different").

In *State v. Thiefault*, 160 Wn.2d 409, 414-15, 158 P.3d 580 (2007), trial counsel agreed the defendant's prior Montana conviction was comparable to a Washington felony. The Court of Appeals ruled this Montana offense was broader than the claimed Washington equivalent, but because the State had not had a chance to prove its factual comparability, it found the defendant did not meet his burden of

proving prejudice. *Id.* at 415-16. The Supreme Court reversed and rejected this prejudice analysis.

The Supreme Court ruled that although “the State may have been able to” produce sufficient information proving comparability, “it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable.” *Id.* at 417. If the prosecution could not have proven comparability, the offense could not have counted as criminal history. *Id.* Consequently, the Supreme Court held there was a reasonable likelihood of prejudice, undermining confidence in the outcome and ordered a new sentencing hearing. *Id.*

Here, it is reasonably probable both Arkansas prior offenses are not comparable to the purportedly equivalent Washington offenses as explained in the Opening Brief, pages 18-22. For the theft allegation, the stipulation and judgment rely on a statute that is broader than the statute that was in effect in 2005 and there is no evidence anyone examined the correct statute. For the sexual abuse conviction, the Alabama statute cited in the stipulation and judgment is broader and different from Washington’s purported equivalent.

In *Lavery*, the Supreme Court explained that when an out-of-state offense has broader legal elements, the accused person had no motivation to contest facts or pursue defenses that would be relevant to the comparability question. 154 Wn.2d at 258. The facial invalidity and demonstrably different elements show both deficient performance and a reasonable probability of a different result. They show that Mr. Greer was not accurately advised of the sentence he faced and at the least, require a new sentencing hearing to insure Mr. Greer is accurately sentenced.

b. Defense counsel's ineffective assistance during the plea and sentencing proceedings also requires giving Mr. Greer the opportunity to withdraw his plea and a new sentencing hearing.

Further undermining Mr. Greer's guilty plea, defense counsel also performed ineffectively by failing to represent Mr. Greer when he asked to withdraw his plea and did not advocate for him at sentencing.

There is "[a]mple authority" that a defendant's request to withdraw his guilty plea "is a critical stage" of proceedings at which a person is constitutionally entitled to effective assistance of counsel.

State v. Harell, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996). Counsel's outright failure to assist his own client constitutes structural error. *Id.* at

805. In addition, when the motion to withdraw a plea rests on ineffective assistance of counsel, this allegation raises a conflict of interest requiring new counsel. When Mr. Greer asked to withdraw his plea before he was sentenced, he said he had “a conflict of interest” with his assigned attorney. 2RP 3. Such a conflict would be obvious since Mr. Greer’s complaints centered on his attorney’s failures, yet the court did not provide him with conflict-free counsel. 2RP 3-4/

Counsel’s mandatory obligations further mandate sentencing representation. But counsel again unreasonably failed to advocate for Mr. Greer at sentencing. Instead, counsel supplied reasons why Mr. Greer was undeserving of a sentence other than the highest possible term. 2RP 8-9.

Counsel’s performance is deficient when it is unreasonable. *Strickland*, 466 U.S. at 690-91. Sentencing advocacy falls within the central core of an attorney’s role in a criminal case. *See* Appellant’s Opening Brief at 15-16 (citing standard explanations of professional norms). Counsel’s abandonment of Mr. Greer during the plea and sentencing processes constitute ineffective assistance of counsel.

2. The incorrect offender score requires remand for a new sentencing hearing.

A sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range. *State v. Malone*, 138 Wn.App. 587, 593, 157 P.3d 909 (2007). A defendant cannot authorize a sentence in excess of that allowed by statute. *Id.*; see *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) (“a defendant cannot agree to punishment in excess of that which the Legislature has established.”); see also *State v. Simpson*, 196 Wash. App. 1062 (2016) (unpublished, cited as non-binding authority pursuant to RAP 14.1) (where defendant agreed to criminal history in negotiated plea agreement, he “cannot” agree to include conviction that has washed out, thus requiring reversal for new sentencing hearing).

Likewise, a new sentencing hearing is required in the case at bar. Mr. Greer was sentenced based on the patently incomparable out-of-state convictions, as explained above and in Appellant’s Opening brief. A comparability hearing must be held or the court lacks authority to increase Mr. Greer’s sentence based on the facially apparent flaws in comparability.

B. CONCLUSION.

For the above-noted reasons and as argued in Appellant's Opening Brief, Mr. Greer is entitled to the opportunity to withdraw his plea and receive a new sentencing hearing.

DATED this 21st day of February 2017.

Respectfully submitted,

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